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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1037

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, ET AL.,
Appellants,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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BRIGHAM E. ROBERTS,
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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 1037

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, IANTHUS WINFORD BARLOW, DR. RULON CLARK ALLRED, OSWALD BRAINICH, EDMUND F. BARLOW, ARNOLD BOSS, HEBER KIMBALL CLEVELAND, LOUIS ALMA KELSCH, JOHN YATES BARLOW, JOSEPH WHITE MUSSER, JOSEPH LYMAN JESSUP, ALMA ADELBERT TIMPSON, CHARLES FREDERICK ZITTING, *Appellants,*

vs.

THE STATE OF UTAH

STATEMENT AGAINST JURISDICTION

In compliance with Rule 12, paragraph 2, of the Supreme Court of the United States the appellee herein presents its statement disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellants and supporting its motion to dismiss the appeal herein.

The Federal Questions Asserted by Appellants Are Not Substantial

It is well established that in order for the Supreme Court of the United States to acquire jurisdiction of a case on appeal the Federal question involved must be substantial. If it is not substantial a motion to dismiss the appeal should be granted.

One Federal question asserted by appellants is that Section 103-51-2, Utah Code Annotated 1943, is unconstitutional as applied to the appellants because it denies to them their religious freedom secured to them by the First and Fourteenth Amendments of the Constitution of the United States.

Religious freedom of the First Amendment is protected by the Fourteenth Amendment from impairment by the States. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81. If an Act of Congress would be in violation of the First Amendment, the same legislation by a State would be in violation of the Fourteenth Amendment. Decisions of the United States Supreme Court as to whether a congressional act similar to said Section 103-51-2 is in violation of the First Amendment is authoritative where it is asserted that said Section 103-51-2 is in violation of the Fourteenth Amendment.

In *Reynolds* v. *U. S.,* 98 U. S. 145, 25 L. Ed. 244, the Supreme Court considered the validity of a statute prohibiting polygamy where it was asserted to be in violation of the First Amendment. Said section 103-51-2 was enacted in furtherance of the effect to stamp out polygamy and the reasoning of the *Reynolds* case is applicable to this statute. In that case the Supreme Court stated:

> "In our opinion, the statute immediately under consideration is within the legislative power of Congress.

It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.''

In *Davis* v. *Beason,* 133 U. S. 333, the Supreme Court again had occasion to consider the First Amendment in connection with a statute which in effect prohibited a person from voting who was a polygamist or who belonged to any order, organization or association which taught, advised, counseled, or encouraged its members or any one to practice

polygamy. It was held that the statute did not violate the First Amendment and the Court stated:

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."

The court also states:

> "It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of their members. And

history discloses the fact that the necessity of human sacrifices on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."

The court quoted from *Murphy* v. *Ramsey*, 114 U. S. 15, as follows:

> "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony—the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this Act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

In concluding its consideration of this religious problem, the court stated:

> "It is assumed by counsel of the petitioner that, because no mode of worship can be established or re-

ligious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is farther from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."

In the *Late Corporation of the Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U. S. 1, the court stated:

"One pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."

The *Reynolds* and *Beason* cases were cited as recently as May 3, 1943, by the Supreme Court of the United States

in the case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, wherein it was said:

> "Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds v. United States, 98 U. S. 145, 161-167, and Davis v. Beason, 133 U. S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate."

The foregoing cases have set at rest the assertion made by appellants herein that said Section 103-51-2 violates the First and Fourteenth Amendments. Where the Supreme Court of the United States has so decided an asserted Federal question it is no longer substantial and the said court does not have jurisdiction. *Leonard* v. *Vicksburg, Shreveport & Pacific Railroad Company,* 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Merrick Co.,* 254 U. S. 376, 41 S. Ct. 142, 65 L. Ed. 312; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062.

In this latter case the problem involved was whether or not a substantial Federal question was presented in determining the jurisdiction of a Federal District Court. The Supreme Court stated:

> "And the Federal question averred may be plainly unsubstantial either because obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

The Court concluded:

> "It follows that the Federal District Court was without jurisdiction because the Federal question presented

was plainly unsubstantial since it had, prior to the filing of the bill, been foreclosed by the two previous decisions last named, and was no longer the subject of controversy."

We submit that there is no substantial Federal question involved here so far as a violation of the First and Fourteenth Amendments by said Section 103-51-2 is concerned.

Appellants assert the invalidity of said Section 103-51-2 by reason of Article 9 of the Treaty of Guadalupe Hidalgo.

The Supreme Court of Utah held that this treaty was not applicable to appellants. The treaty only purports to apply to "Mexicans—in the territories aforesaid," and it does not appear that the appellants or any of them were Mexicans in the territories aforesaid. In any event the language of this treaty with relation to the free exercise of religion is the same as the First Amendment and the cases heretofore cited and quoted construing said Amendment are also conclusive on this question.

It is to be noted that the Supreme Court of Utah did not hold that said treaty was invalid, and only when a treaty is declared invalid can the Supreme Court of the United States acquire jurisdiction on appeal from a State court. See Vol. 1 Ohlinger's Federal Practice, page 831, *et seq.*; *Ireland* v. *Woods*, 246 U. S. 323, 38 S. Ct. 319, 62 L. Ed. 745; *Schoff* v. *Famechon Co.*, 258 U. S. 76, 42 S. Ct. 189, 66 L. Ed. 472; *Erie R. Co.* v. *Hamilton*, 248 U. S. 369, 39 S. Ct. 95, 63 L. Ed. 307.

The remaining grounds relied upon by appellants as giving the Supreme Court of the United States jurisdiction on appeal are that they were denied due process of law and the equal protection of the law as secured to them by the Fourteenth Amendment to the Constitution of the United States. (The Fourth, Fifth and Sixth Amendments do not secure to appellants protection against acts of the State Government.)

Appellants' specific claims are not clear from their Statement of Jurisdiction. They assert that they were denied the presumption of innocence and that their convictions were based upon inferences based upon inference. This assertion lacks all color of merit and has no substance or foundation.

Section 103-51-2, Utah Code Annotated, 1943, makes it unlawful for any person to cohabit with more than one person of the opposite sex. By information each of the appellants, who are males, was charged with cohabiting with more than one woman. Each appellant pleaded not guilty. The trial of each appellant was had upon a stipulation which stated that the testimony of the State of Utah would be to the effect that each appellant cohabited with more than one woman. Dates, venue and names of the women were contained in each stipulation. It is to be noted that these stipulations were in the words of the said statute. The word, "cohabit" has a well defined meaning, i. e., the living or dwelling together as husband and wife. See Opinion of the Supreme Court of Utah herein, *United States* v. *Cannon*, 4 Utah 122, 7 P. 369; *Cannon* v. *United States*, 116 U. S. 55, 6 S. Ct. 278, 29 L. Ed. 561.

Upon this stipulation each case was submitted to the trial court, and that court found each appellant guilty as charged. We submit that upon the stipulation presented no other result could be reached. Each appellant stipulated that the testimony of the State would show that he did the very thing prohibited by the statute and in the words of the statute. How there was a denial of the presumption of innocence or a conviction by an inference based upon an inference we are at a loss to see. Such a contention is frivolous, without merit and has no substance or foundation. Such a contention will not give the Supreme Court of the United States jurisdiction. *Re Spies*, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80; *Re Boardman*, 169 U. S. 39, 18 S. Ct. 29,

42 L. Ed. 653; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 24 S. Ct. 224, 48 L. Ed. 328; *Swafford* v. *Templeton,* 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005; *Seaboard Air Lines R. Co.* v. *Padgett,* 236 U. S. 668, 35 S. Ct. 481, 59 L. Ed. 777; *Levering & Garrigues Co.* v. *Morrin, supra.*

The cases cited by appellants are not in point and are not helpful. For instance, in *Howard* v. *Fleming,* 191 U. S. 126, 48 L. Ed. 121, the only reference to presumption of innocence is found in the following quotation:

> • • • the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process."

In *McFarland* v. *American Sugar Refining Co.,* 241 79, 36 S. Ct. 498, 60 L. Ed. 899; *Tot* v. *United States,* 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519, *Mobile R. Co.* v. *Turnipseed,* 219 U. S. 35, 31 S. Ct. 136, statutes were involved which provided that proof of one fact should be presumptive or *prima facie* evidence of another fact. The Court merely made an application in each case of the rule that there must be a rational connection between the facts proved and the facts presumed therefrom in order that the statutes comply with due process. In *Chambers* v. *Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, the use of an involuntary confession as a denial of due process was involved. In *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527, failure to furnish counsel to defendants in criminal cases as a denial of due process was involved.

We submit that there is no substantial Federal question here involved and that the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

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Attorneys for Appellee.

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Appellants

vs.

STATE OF UTAH

MOTION TO DISMISS APPEAL

Comes now the appellee in the above entitled matter and respectfully moves the Court to dismiss the appeal of the appellants and each of them upon the following grounds, to-wit:

1. That there is no substantial Federal question involved in said appeal.

2. That said statement as to jurisdiction and the assignment of errors do not state grounds sufficient to give the Supreme Court of the United States jurisdiction of this appeal.

Dated this 19th day of February, A. D. 1945.

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